

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHARLES V. REED,

Plaintiff,

v.

WASHINGTON STATE
DEPARTMENT OF CORRECTIONS,
et al.,

Defendants.

CASE NO. C16-5993 BHS

ORDER ON DEFENDANTS'
THIRD SUMMARY JUDGMENT
MOTION

THIS MATTER is before the Court on Magistrate Judge David W. Christel's Report and Recommendation ("R&R") recommending that the Court (1) grant Defendants' Motion to Strike evidence Plaintiff Charles Reed provided in his supplemental response to summary judgment; (2) grant in part and deny in part Defendants' third Motion for Summary Judgment, Dkt. 160; and (3) dismiss Reed's federal claims with prejudice, dismiss his state law claims without prejudice, and close the case. Dkt. 180. Reed objects, Dkt. 188, and Defendants responded, Dkt. 189.

I. BACKGROUND

The factual context of the case and its long procedural history are described in Judge Christel’s prior Reports and Recommendations, *see* Dkts. 57, 87, and 137, and in the R&R which is the subject of this Order, Dkt. 180. Neither need to be detailed here.

Reed has had Hepatitis C (“HCV”) since 1979. The Department of Corrections (“DOC”) confirmed this diagnosis in 2012, while Reed was incarcerated at Airway Heights Corrections Center. By June 2014, Reed had a “METAVIR” score of F2, which indicates moderate scarring of the liver on the F0–F4 scale. In August 2014, Reed was transferred to Stafford Creek Corrections Center, where he sought treatment for his disease. His treatment request was ultimately referred to the Hepatitis C Care Review Committee (“CRC”), which in January 2016 denied his request for treatment under the DOC’s then-applicable 2015 triage protocol.

Reed grieved the denial through Levels I, II, and III of the DOC’s grievance system, all of which were disapproved. In February 2016, Reed sent a Notice of Complaint to Defendant Dr. Hammond (DOC’s Chief Medical Officer), complaining that he was not receiving necessary medical care for a serious medical condition. He repeated this complaint in a letter to Hammond and Defendant Dr. Strick (DOC’s Statewide Infectious Diseases Physician) three days later. *See generally* Dkt. 96 at 6–14.

Reed claims that his HCV has been inadequately monitored and treated over time. He alleges that the DOC’s HCV protocol changed in October 2016, making those with a METAVIR score of F2 or higher eligible for the highest treatment priority for anti-viral medication. He alleges that no one informed of this change and that he was not given

1 high priority treatment despite his eligibility. Reed sued pro se in late 2016, Dkts. 1 and
2 6, alleging that Hammond, Strick, the DOC, and others violated his Eighth and
3 Fourteenth Amendment rights by denying him access to necessary medical treatment.

4 Reed ultimately was appointed counsel, Dkt. 63, and filed a second amended
5 complaint, Dkt. 96. Reed alleges that he finally obtained a new liver scan in June 2017,
6 which showed that he had a METAVIR score of F4 and indicated very severe liver
7 scarring known as cirrhosis. Dkt. 96 at 7. His operative complaint asserts an Eighth
8 Amendment claim under 42 U.S.C. § 1983 and a state law medical negligence claim
9 under RCW 7.70.040. Dkt. 96 at 10–11. The remaining Defendants¹—Hammond, Strick,
10 and Dr. Smith,² Stafford Creek’s Facility Medical Director at the time—have
11 unsuccessfully sought summary judgment and judgment on the pleadings on qualified
12 immunity and other grounds during this litigation. *See* Dkts. 40, 62, 90, 108, 120, 132,
13 and 147.

14 Now pending is Defendants’ third motion for summary judgment, Dkt. 160, which
15 argues that Reed did not exhaust his administrative remedies and that he cannot meet his
16 burden of demonstrating that Drs. Hammond, Strick, and Smith violated his Eighth
17 Amendment rights for several reasons. They also argue that they are entitled to qualified
18 immunity, though that argument is based primarily on the position that there was no
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21 ¹ Reed has conceded his claims against Defendant Robert Weber, and as the R&R
22 recommends, Dkt. 180 at 2, Reed’s claims against Weber are DISMISSED with prejudice.

² Smith now goes by Kariko. The Order uses Smith for clarity.

1 constitutional deprivation, rather than an argument that any violation was not clearly
2 established.³ *Id.* at 16–17.

3 Defendants also seek summary judgment on Reed’s state law medical malpractice
4 claim, arguing that he has failed to provide the required expert testimony that their
5 conduct fell below the standard of care and that he has not shown that any breach of duty
6 proximately caused him harm. *Id.* at 19–23. They also argue they are entitled to qualified
7 immunity under state law. *Id.* at 22.

8 Judge Christel held oral argument on the motion and directed the parties to
9 provide a round of supplemental briefing. Dkt. 173. Defendants filed a supplemental
10 brief, Dkt. 175, and Reed filed a supplemental response, Dkt. 176. Reed also filed a
11 supplemental declaration of counsel with additional evidence attached as exhibits. Dkt.
12 177. Counsel testified that each exhibit had been produced by Defendants in discovery,
13 except for the deposition of Defendants’ expert, Dr. Zawitz, Dkt. 177-5, Ex. E. *See* Dkt.
14 177.

15 Defendants’ supplemental reply, Dkt. 178, included an objection to the newly
16 submitted evidence, arguing that the Court’s Order sought “supplemental briefing to
17 clarify several issues” and asked the parties to “cite relevant law and evidence in the
18 record.” Dkt. 178 at 1 (citing Dkt. 173 at 1, 3). Defendants moved to strike the evidence
19 that was not already in the summary judgment record, which included Exhibits E–L, N,
20 and O. *See* Dkts. 177-5–177-12; 177-14; 177-15.

21
22 ³ Defendants have previously moved for summary judgment and for judgment on the
pleadings on qualified immunity, and those motions have been denied. *See* Dkts. 62, 90, and 147.

1 Judge Christel's R&R explained that his Order sought citations to the existing
2 summary judgment record and was not "an invitation for Plaintiff to have a second
3 opportunity to bring new evidence to the Court's attention which could and should have
4 been brought in the original briefing and submissions." Dkt. 180 at 9. It agreed that the
5 Defendants would be prejudiced by their inability to respond to the evidence and
6 therefore granted Defendants' motion to strike the bulk of the evidence provided in
7 Reed's supplemental response. *Id.*

8 The R&R recommended holding that Reed did exhaust his administrative
9 remedies and denying Defendants' third summary judgment motion on that basis. *Id.* at
10 24. Defendants do not object to that recommended ruling, and it is ADOPTED.

11 The R&R recommended granting Defendants' motion on Reed's Eighth
12 Amendment claim based on its conclusion that Defendants did not violate Reed's
13 constitutional rights. As a result, it did not reach the issue of whether any violation was
14 clearly established. *Id.* at 50. Finally, the R&R recommended declining to continue
15 exercising supplemental jurisdiction over Reed's remaining state law medical malpractice
16 claim, under 28 U.S.C. § 1367(c)(3), and dismissing that claim without prejudice to re-
17 file in state court. *Id.* at 50–51.

18 This Court has previously modified or declined to adopt some of Judge Christel's
19 recommendations about resolving this complicated case, Dkts. 62, 90, and 147, and while
20 it appreciates the hard work reflected in the R&Rs, it must again differ from its colleague
21 on the resolution of the issues raised this time. The Court will not strike Reed's "new"
22 evidence, and it does not agree that Hammond, Strick, and Smith are entitled to summary

1 judgment on Reed's Eighth Amendment claim based on their argument that they did not
2 violate his rights as a matter of law. For that reason, the Court cannot agree that
3 Defendants' entitlement to qualified immunity, even if they did violate Reed's rights,
4 need not be addressed. Finally, it does not agree that Reed's state law medical
5 malpractice claims should be dismissed without prejudice and re-filed in state court, after
6 nearly six years of active litigation here.

7 The issues are addressed in turn.

8 **II. DISCUSSION**

9 **A. Legal Standards**

10 A district judge must determine de novo any part of the magistrate judge's
11 disposition to which a party has properly objected. The district judge may accept, reject,
12 or modify the recommended disposition; receive further evidence; or return the matter to
13 the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3). Objections to a R&R are
14 not a vehicle to relitigate the same arguments carefully considered and rejected by the
15 Magistrate Judge. *See, e.g., Fix v. Hartford Life & Accident Ins. Co.*, CV 16-41-M-
16 DLC-JCL, 2017 WL 2721168, at *1 (D. Mont. June 23, 2017) (collecting cases). A
17 proper objection requires specific written objections to the findings and recommendations
18 in the R&R. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
19 banc).

20 Summary judgment is proper if the pleadings, the discovery and disclosure
21 materials on file, and any affidavits show that there is "no genuine dispute as to any
22 material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ.

1 P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence
2 in the light most favorable to the nonmoving party and draw all reasonable inferences in
3 that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986);
4 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact
5 exists where there is sufficient evidence for a reasonable factfinder to find for the
6 nonmoving party. *Anderson*, 477 U.S. at 248.

7 The inquiry is “whether the evidence presents a sufficient disagreement to require
8 submission to a jury or whether it is so one-sided that one party must prevail as a matter
9 of law.” *Id.* at 251–52. The moving party bears the initial burden of showing that there is
10 no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp.*
11 *v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the
12 nonmoving party then must show that there is a genuine issue for trial. *Anderson*, 477
13 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of
14 material fact, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477
15 U.S. at 323 (internal quotation omitted). There is no requirement that the moving party
16 negate elements of the non-movant's case. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871,
17 885 (1990). Once the moving party has met its burden, the non-movant must then
18 produce concrete evidence, without merely relying on allegations in the pleadings, that
19 there remain genuine factual issues. *Anderson*, 477 U.S. at 248.

B. The Court declines to adopt the recommendation to strike relevant, admissible evidence.

Reed objects to the R&R's striking the evidence he submitted in support of the supplemental briefing the Magistrate Judge sought and authorized, and the provision of which violated no rule of civil procedure or evidence. Dkt. 188 at 1–4. Reed argues that by striking his evidence, the Magistrate Judge effectively ignored relevant, admissible evidence. He explains that he read the Order to mean to supply evidence in the larger “record” (exchanged in discovery, as opposed to, for example, a new declaration from an undisclosed expert). *Id.* at 2. He points out, persuasively, that even on this review this Court may “receive further evidence,” Fed. R. Civ. P. 72(b)(3), and that it in any event should review the stricken evidence as part of its *de novo* review of the underlying issues triggered by his objections, Dkt. 188 at 2.

It is true that one fair reading of Judge Christel's Order would have been to use the supplemental briefing to point to evidence already in the summary judgment record, and his R&R confirms that that is what he intended. But Judge Christel had issued a substantially similar Order, Dkt. 67, with respect an earlier summary judgment motion, Dkt. 40, and in response Defendants filed two substantive declarations replete with “new” exhibits. *See* Dkt. 70 (Strick Declaration), Dkt. 70-1 (fifteen pages of exhibits), Dkt. 71 (Eschbach Declaration),⁴ and Dkt. 71-1 (twelve pages of exhibits). In short, it is not entirely out of the norm, generally or in this case, for a party asked to provide post-

⁴ Defendants current, third motion for summary judgment relies on this evidence. Dkt. 160 at 4.

1 hearing summary judgment briefing to support that filing with additional evidence, the
2 need for which was revealed by the underlying request for briefing. It was not unfair of
3 Reed to act in a similar manner, in response to a similar order.

4 The Court cannot agree that the evidence should have been stricken as prejudicial
5 or unfair to Defendants. This is Defendants' *fifth* dispositive motion in the case. Any
6 explicit or implicit argument that one gets only a single chance to build a summary
7 judgment case plainly has not applied in this case. The case is almost six years old, and it
8 does not have a trial date. Reed's proffered evidence is not new, at least not to the
9 Defendants: they produced all of it in discovery, except for the deposition of their expert,
10 Dr. Zawitz, the opinions of whom both the Defendants' motion⁵ and the R&R⁶ expressly
11 rely. Indeed, Reed alleges that, because of Zawitz's schedule, he was not able to depose
12 Zawitz until after his initial summary judgment response was filed. Dkt. 188 at 4.

13 Defendants' motion to strike was based on their claim they were prejudiced
14 because they were "unable" to respond to the additional evidence. But Defendants had
15 ample opportunity to respond.

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18 ⁵ See Dkt. 160 at 4 ("According to Defendants' expert, Dr. Chad Zawitz, M.D.,
19 Defendants' deferral of treatment for early stage fibrosis with ongoing interval monitoring was
20 consistent with the general practice in the community-at-large at that time, including American
21 Association for the Study of Liver Disease/Infectious Diseases Society of America
22 (AASLD/IDSA) and Federal Bureau of Prisons (FBOP) Guidelines.").

⁶ See Dkt. 180 at 39 ("Dr. Zawitz opined Plaintiff's symptoms were not of the nature
outlined or implied in the DOC HCV protocol and are not the type of extrahepatic symptoms
which indicate a rapid progression. Dr. Zawitz opined the CRC's 2016 decision was consistent
with their active protocol as well as the current standard of care at that time." (internal citations
omitted)).

1 Judge Christel's Order authorizing and requesting an additional round of briefing,
2 Dkt. 173, expressly permitted Defendants to file a supplemental reply. Defendants could
3 have used that filing to respond to or rebut Reed's "new" evidence, rather than, or
4 perhaps in addition to, objecting to it. Defendants filed their reply but did not address
5 Reed's evidence other than to ask that it be stricken as untimely. Any prejudice from
6 electing not to do so is not unfair and it is not attributable to Reed.

7 Defendants' Response to Reed's Objections to the R&R relies on the rule that a
8 Court will not generally address arguments or evidence raised for the first time in a reply
9 brief. Dkt. 189 at 2 ("new evidence should not generally be offered with a reply brief").
10 But that rule applies to *moving parties*, not to the non-moving party's responsive brief.
11 *See Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) ("It is
12 well established that new arguments and evidence presented for the first time *in Reply* are
13 waived." (citing *United States v. Patterson*, 230 F.3d 1168, 1172 (9th Cir. 2000)
14 (emphasis added)). The purpose of the rule is that it would be unfair to grant summary
15 judgment on evidence or argument to which the non-moving party did not have an
16 opportunity to respond. That is not this case.

17 While the procedural posture of this case (post-hearing supplemental briefing on a
18 fifth dispositive motion) was perhaps slightly unusual, it is inarguably the standard course
19 for a non-moving plaintiff to respond to a summary judgment motion with evidence
20 supporting his argument that a question of fact precludes summary judgment in the
21 defendant's favor. *Celotex*, 477 U.S. at 323–24. Reed did not need, and need not have
22 requested, a Rule 56(d) continuance of Defendants' motion to obtain more evidence; he

1 sought to introduce evidence he had already obtained from Defendants into the summary
2 judgment record, in light of the oral argument on Defendants' motion. In this Court's
3 view, that is not an act worthy of what would amount to an unreasonable sanction. Reed
4 accurately distinguishes his conduct in submitting the evidence from authority striking
5 evidence in much more "extreme" situations, such as failing to disclose an expert. *See*
6 Dkt. 188 at 2.

7 Finally, and in any event, Reed correctly argues that because he is objecting to the
8 recommendation that the Court strike these exhibits, this Court must review the ruling,
9 and the documents, de novo, under Rule 72. For these reasons, the Court DECLINES to
10 adopt the R&R's recommendation that the Court strike a portion of the exhibits Reed
11 filed at Dkt. 177. Defendants' Motion to Strike is DENIED.

12 **C. Viewed in the light most favorable to Reed, the evidence would support a jury**
13 **verdict finding Defendants violated Reed's Eighth Amendment rights.**

14 Reed claims that Defendants delayed treating his HCV for years despite their
15 awareness of the serious medical risk posed by failing to treat his disease. He argues that
16 he had, and complained of, "extrahepatic manifestations" of HCV that warranted
17 treatment with Direct-Acting Anti-Virals ("DAA") that would have slowed his disease,
18 even under the DOC's 2015 protocol. He argues that Hammond and Strick were on the
19 CRC that denied him treatment in January 2016. He argues that his F2 METAVIR score
20 should have permitted him treatment under the DOC's revised October 2016 HCV
21 protocol even absent such symptoms, but no one even told him about the revision, and no
22 one treated him despite his eligibility, his symptoms, and his request for treatment. He

1 argues and demonstrates that no one reassessed his METAVIR score until June 2017,
2 when a “Fibroscan” test revealed his score had progressed to F4 (the highest), indicating
3 cirrhosis. He alleges that the delay and the lack of treatment amounts to the Defendant
4 doctors’ deliberate indifference to his serious medical needs and a violation of his Eighth
5 Amendment rights. *See* Dkts. 96 and 162 at 1–4.

6 The parties agree that a prisoner plaintiff claiming an Eighth Amendment violation
7 due to a medical condition must show deliberate indifference to a serious medical need.
8 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Deliberate indifference to a serious medical
9 need requires an official “knows of and disregards an excessive risk to inmate health or
10 safety.” Dkt. 160 at 8 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

11 Defendants argue that to show a constitutional violation, Reed must do more than
12 show culpability greater than an ordinary lack of due care for a prisoner’s health; the
13 Court’s inquiry must focus on what the defendant doctors actually knew, not what they
14 should have known. *Id.* They argue, correctly, that this standard requires evidence of both
15 objective and subjective components.

16 First, the deprivation alleged must objectively be sufficiently serious that it results
17 in a denial of the “minimal civilized measures of life’s necessities.” *Farmer*, 511 U.S. at
18 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). To demonstrate this
19 objective component, an inmate must establish (1) there was some degree of actual or
20 potential injury, and (2) society considers the acts or omissions of which the plaintiff
21 complains to be so grave that exposing anyone to the acts or omissions, unwillingly,
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1 violates contemporary standards of decency. *Helling v. McKinney*, 509 U.S. 25, 36
2 (1993); *see also Estelle*, 429 U.S. at 97.

3 Second, a prison official is liable if he knows of and disregards an excessive risk
4 to inmate health or safety. He must both be aware of facts from which an inference could
5 be drawn that there is a substantial risk of serious harm, and he must actually draw that
6 inference. *Farmer*, 511 U.S. at 837. Against these legal standards, Defendants argue in
7 this motion (as in their prior motions) that Reed cannot make out a constitutional
8 violation as a matter of law.

9 As an initial matter, Defendants urged the Court to evaluate the constitutionality of
10 each of the events about which Reed complains separately and, at least implicitly, not to
11 look at the totality of the circumstances surrounding Reed's treatment while he was under
12 Defendants' medical care. Judge Christel agreed, and the R&R divided Reed's Eighth
13 Amendment claim into four distinct events. It did so because Reed is obligated to
14 demonstrate that Defendants personally participated in each constitutional deprivation.
15 Dkt. 180 at 27. It recommends granting summary judgment on each "claim" and
16 dismissing Reed's Eighth Amendment claim.

17 Reed objects to this "divide and conquer" approach, arguing that the denial of
18 medical care over time is a single constitutional claim, and a defendant cannot divide
19 each discrete act or moment into a distinct claim and argue that that discrete moment was
20 not unconstitutional. Dkt. 188 at 11 (citing *McAlphin v. Toney*, 375 F.3d 753 (8th Cir.
21 2004) (reversing district court's decision to construe plaintiff's allegations as multiple
22 claims rather than a single claim when they all related to the same denial of medical

1 treatment)). Reed also objects generally to the R&R's application of the summary
2 judgment standard, arguing that the R&R overtly refused to view the evidence in the light
3 most favorable to him, the non-moving party, and to draw all justifiable inferences in his
4 favor. He argues that the R&R fails to do so "over and over." *Id.* at 4.

5 The first of these instances relates to the R&R's conclusion that a difference of
6 medical opinion cannot amount to a constitutional violation, as a matter of law. Dkt. 180
7 at 39 ("A mere difference of opinion as to which medically acceptable course of
8 treatment should be followed does not establish deliberate indifference." (citing *Sanchez*
9 *v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). The R&R describes the parties' experts'
10 competing opinions about Reed's care, *id.* at 38–42, but concludes—based on the opinion
11 testimony of Defendants and their expert—that a difference of medical opinion over
12 which course of treatment was best cannot be a constitutional violation as a matter of law,
13 *id.* at 42.

14 Reed responds, accurately, that this "difference of medical opinion" concept
15 applies only where the competing view of medical opinions are both medically
16 acceptable and that that is a question of fact for the jury. Dkt. 188 at 4–5 (citing *Snow v.*
17 *McDaniel*, 681 F.3d 978, 987–88 (9th Cir. 2012), *overruled on other grounds by Peralta*
18 *v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)). Defendants' claim that their own testimony,
19 and that of their expert, effectively rebuts contrary evidence as a matter of law is not
20 correct. As Reed points out, Defendants' expert, Dr. Zawitz, is not an HCV expert.
21 Reed's expert, Dr. Gish, who is an HCV expert, testifies to the opposite conclusion. Reed
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1 claims that the R&R accepted Zawitz’s testimony and rejected Gish’s, which is an
2 erroneous application of the summary judgment standard. *Id.* at 5. The Court agrees.

3 It would be anomalous, at least, if a state medical provider could obtain summary
4 judgment based on her own opinion that her care was constitutionally permitted. This
5 Court will not so hold. The Court agrees with Reed that the “competing medical
6 opinions” present a question of fact for the jury, precluding summary judgment on this
7 basis. Defendants’ claim they are entitled to summary judgment based on their own
8 testimony that their care was reasonable is not persuasive, and their motion on this basis
9 is DENIED.

10 Reed also argues that the R&R erroneously agreed with Defendants’ assertion that
11 it was “undisputed” that Smith (then the Stafford Creek doctor) did not herself act with
12 deliberate indifference. Dkt. 188 at 7 (citing Dkt. 180 at 29). As Reed argues—and as this
13 Court has previously ruled, *see* Dkt. 90 at 3–5—there is evidence from which a jury
14 could reasonably conclude that Reed had, and complained of, multiple extrahepatic
15 symptoms. Defendants argue that Reed cannot prevail unless he can prove that the
16 doctors were subjectively aware that his disease was rapidly progressing, and the R&R
17 agreed. But Reed’s claim is based on the Defendants’ refusal to investigate his
18 symptoms, which can amount to deliberate indifference. Dkt. 188 at 8–9 (citing *Estate of*
19 *Silva v. City of San Diego*, No. 3:18-cv-2282-L-MSB, 2020 WL 6946011, at *17 (S.D.
20 Cal. Nov. 25, 2020) (failure to investigate can constitute deliberate indifference)).
21 Deliberate indifference does not require a showing of “acts or omissions . . . with
22 knowledge that harm will result.” *Farmer*, 511 U.S. at 835. A plaintiff must show that the

1 defendants knew of and disregarded a substantial risk of serious harm, not that harm was
2 actually occurring, and that defendants were actually aware of it. *See id.* at 847.

3 Defendants' reading of the rule would permit prison doctors to prevail as a matter
4 of law based on their willful ignorance of the prisoner's medical condition and needs.
5 Reed has demonstrated that Eschbach, Smith, and the CRC (which included Hammond
6 and Strick) knew he was complaining of "fatigue, cough, shortness of breath,
7 palpitations, nausea, muscle/joint pain, easy bruising, and anxiety," Dkt. 188 at 8 (citing
8 Dkt. 42-1 at 62–63). The R&R also noted there was evidence that Reed had, in October
9 2015, reported symptoms including "Fatigue, Visual Changes, Cough, Shortness of
10 Breath, Palpitations, Hemorrhoids with Bright Red Blood Per Rectum, Constipation,
11 Nausea, Muscle/Joints Aches, Easy Bruising, and Anxiety." Dkt. 180 at 14 (citing, *inter*
12 *alia*, Dkt. 42-1 at 63).

13 Strick noted that Reed had "prediabetes," which can be an extrahepatic
14 manifestation. Defendants also knew he had liver disease with a METAVIR score of F2,
15 a clear source of the multiple symptoms, requiring further investigation. Eschbach was
16 not entirely aware of what extrahepatic symptoms were and testified that she could
17 "Google" such symptoms. *See* Dkt. 162 at 17 (citing Eschbach Deposition, Dkt. 164-3 at
18 63–66). Reed further asserts that Defendants' expert, Zawitz, conceded in his deposition
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1 that Reed’s fatigue was “more likely than not associated with his HCV.” Dkt. 188 at 7
2 (parenthetically quoting Dkt. 177-5 at 29).⁷

3 Reed argues that he need not demonstrate that Defendants “actually knew” that his
4 symptoms were progressing rapidly; the issue instead was (and is) whether Defendants
5 were conscious of an “excessive risk” to Reed’s health and were “subjectively aware of
6 his serious medical need.” Dkt. 162 at 8 (citing, *inter alia*, *Farmer*, 511 U.S. at 835;
7 *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1082 (9th Cir. 2013)). Reed
8 argues that a jury could find that Defendants’ failure to investigate further amounts to
9 deliberate indifference, even in the absence of subjective knowledge that his disease was
10 rapidly progressing. The Court agrees and will not adopt the R&R’s recommended
11 dismissal of Reed’s claims on this basis. Defendants’ Third Motion for Summary
12 Judgment on this basis is DENIED.

13 Reed also argues that the R&R improperly conflated traditional vicarious liability
14 concepts—which do not apply in § 1983 actions—with supervisor liability under § 1983,
15 which is a plausible claim. Defendants’ “lack of personal participation” defense relies on
16 their own testimony that they were not personally involved in or responsible for any
17 unconstitutional conduct. Each defendant testifies that he or she was not responsible for
18 Reed’s care; they seem to suggest that non-party Nurse Eschbach was responsible,
19 instead. Reed points out that the R&R’s acceptance of this position both views the
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21 ⁷ Based on the Court’s review of Zawitz’s deposition transcript filed, Dkt. 177-5, the
22 Court is unable to find this direct quote. Though, based on a review of the transcript, Zawitz did
concede that fatigue is associated generally with HCV. *See, e.g.*, Dkt. 177-5 at 69:11–16.

1 evidence and its reasonable inferences in the light most favorable to the Defendants and
2 misapplies the rule that there is no § 1983 vicarious liability for constitutional claims. He
3 argues that the Defendant doctors cannot escape liability by claiming that they had no
4 personal role in the denial of the care he claims was required.

5 To establish that a defendant is liable for a claim under 42 U.S.C. § 1983, a
6 plaintiff must show “(1) that the conduct complained of was committed by a person
7 acting under color of state law; and (2) that the conduct deprived the plaintiff of a
8 constitutional right.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
9 1988) (internal citation omitted). “Because vicarious liability is inapplicable to . . . § 1983
10 suits, a plaintiff must plead that each Government-official defendant, through the
11 official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556
12 U.S. 662, 676 (2009).

13 Supervisory liability is imposed against a supervisory official in his individual
14 capacity for his own culpable action or inaction in the training, supervision, or control of
15 his subordinates, for his acquiescence in the constitutional deprivations of which the
16 complaint is made, or for conduct that showed a reckless or callous indifference to the
17 rights of others. *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009). A defendant can
18 only be liable for inadequate training if “the need for more or different training is
19 obvious, and the inadequacy so likely to result in violations of constitutional rights, that
20 the [supervisor] . . . can reasonably be said to have been deliberately indifferent to the
21 need.” *Peschel v. City of Missoula*, 686 F. Supp. 2d 1092, 1099 (D. Mont. 2009) (quoting
22 *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir. 2002) (alteration in original)).

1 A supervisor may be liable under § 1983 if there exists either “(1) his or her
2 personal involvement in the constitutional deprivation, or (2) a sufficient causal
3 connection between the supervisor’s wrongful conduct and the constitutional violation.”
4 *Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001) (internal quotation omitted). “The
5 requisite causal connection may be established when an official sets in motion a series of
6 acts by others which the actor knows or reasonably should know would cause others to
7 inflict constitutional harms.” *Corales*, 567 F.3d at 570 (internal quotation omitted).

8 The R&R erroneously viewed the evidence in the light most favorable to
9 Defendants, and it conflated vicarious or *respondeat superior* liability with supervisor
10 liability under § 1983. *See* Dkt. 180 at 47–49. Viewed in the light most favorable to Reed,
11 the Defendant doctors are charged with supervising others, such as Nurse Eschbach, who
12 failed to recognize and investigate Reed’s symptoms and his disease. The R&R’s
13 rejection of this claim based on the inapplicability of vicarious liability or a lack of
14 personal participation does not address this standard, and the Court cannot adopt its
15 recommended resolution of Defendants’ motion. Defendants’ motion for summary
16 judgment on this basis is DENIED.

17 Defendants similarly argue that the CRC made the decision not to treat Reed in
18 January 2016 and that the individual doctors therefore did not personally participate in
19 that decision. The R&R agreed, and Reed objects, arguing that committee membership is
20 not an absolute shield from § 1983 liability. Dkt. 188 at 11–12. Hammond and Strick
21 were on the CRC, and they employed their specialized knowledge in the performance of
22 their duties on it. There is evidence they participated in that body’s decision not to treat

1 Reed. As Reed points out, there is evidence that Hammond’s was on the CRC because
2 the new medications had a “very substantial cost.” *Id.* at 6; Dkt. 164-1 at 73:6–17. The
3 CRC is not a person that can be sued under § 1983.

4 Reed argues that if the R&R on this point is correct, then “medical providers at the
5 DOC can be completely immunized from Eighth Amendment liability under § 1983 (and,
6 for practical purposes, relieved of the Constitutional obligation to provide adequate
7 medical care) based on the structure of the bureaucracy they create.” Dkt. 188 at 11.

8 The Court agrees, and therefore DECLINES to adopt the R&R’s recommendation
9 that the Court grant Defendants’ motion on this point, and Defendants’ Third Motion for
10 Summary Judgment on this basis is DENIED.

11 Finally, Reed objects to the R&R’s acceptance of Defendants’ explanation for the
12 CRC’s conclusion that Reed “will likely die of an alternate process.” Dkt. 180 at 36–37.
13 The Court agrees that this statement is susceptible to different interpretations, but on
14 summary judgment it must view the evidence in the light most favorable to the non-
15 moving party. Thus, while Dr. Hammond’s “benign” explanation of this statement, *see*
16 *id.* at 36, may ultimately be persuasive, it is not a factual basis for summary judgment.
17 This Court previously held that a reasonable jury could conclude that such an explicit
18 statement, combined with other facts, could establish deliberate indifference to Reed’s
19 serious medical needs, *see id.* at 37, and that conclusion remains true for purposes of
20 summary judgment, notwithstanding Hammond’s explanation.

21 In short, the Court agrees that the R&R generally viewed the evidence in the light
22 most favorable to Defendants, rejected Reed’s evidence, and drew inferences in

1 Defendants’ favor, not his. It does not agree that, viewed in the light most favorable to
2 the non-moving Plaintiff, the evidence properly in the record could not lead a jury to find
3 that Defendants were deliberately indifferent to Reed’s serious medical needs and that
4 Defendants personally participated in the decision not to treat him. Their “difference of
5 opinion” argument presents a question of fact, as do their arguments about Reed’s
6 symptoms and what they meant.

7 The Court DECLINES to adopt the R&R’s recommended summary dismissal of
8 Reed’s Eighth Amendment claim, and Defendants’ Third Summary Judgment Motion on
9 each of these bases is DENIED.

10 **D. Defendants are not entitled to qualified immunity.**

11 Defendants’ motion argues that they are entitled to qualified immunity. Dkt. 160 at
12 8 and 17. As Reed accurately points out, they do not substantively address the “second
13 prong” of the qualified immunity test: whether a reasonable official would have known
14 that their conduct violated a *clearly established* constitutional right. Instead, in a
15 relatively short section of their motion, they mostly repeat the argument that they did not
16 violate Reed’s rights as a matter of law, so it cannot have been clearly established that
17 their conduct was unconstitutional. *Id.* at 16–17.

18 Because the R&R determined that the Defendants did not violate Reed’s Eighth
19 Amendment rights as a matter of law, it did not reach the second prong of the
20 Defendants’ qualified immunity defense—whether it would have been clear to a
21 reasonable official that the conduct violated the constitution. Dkt. 180 at 50. The Court
22 above has declined to adopt the Magistrate Judge’s recommendation on that point and

1 determined that, properly viewed in the light most favorable to Reed, the evidence
2 supports a finding that the Defendants violated his constitutional rights. This leaves for
3 further inquiry and analysis the Defendants' claim that they are qualifiedly immune
4 because the right was not clearly established. The Court notes that this issue has been
5 previously argued, and the Court has previously denied Defendants' qualified immunity
6 claim in prior Orders.

7 Under the qualified immunity doctrine, "government officials performing
8 discretionary functions generally are shielded from liability for civil damages insofar as
9 their conduct does not violate clearly established statutory or constitutional rights of
10 which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818
11 (1982).

12 A two-part test resolves claims of qualified immunity by determining whether
13 plaintiffs have shown facts that "make out a violation of a constitutional right," and if so,
14 whether the "right at issue was 'clearly established' at the time of defendant's alleged
15 misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal citation omitted).
16 *Pearson* reversed *Saucier v. Katz*, 533 U.S. 194 (2001), and permits the Court to address
17 the parts in either order. 555 U.S. at 236. If there was not constitutional violation, at all,
18 qualified immunity is not at issue; there is no constitutional claim from which the
19 defendant is immune. And, where a defendant's entitlement to qualified immunity
20 depends on "disputed issues of material fact that need to be resolved by a jury," a district
21 court should deny summary judgment. *Thomas v. Gomez*, 143 F.3d 1246, 1249 (9th Cir.
22 1998).

1 Even if a defendant's decision is constitutionally deficient, qualified immunity
2 shields him from suit if his misapprehension about the law applicable to the
3 circumstances was objectively reasonable. *See Brosseau v. Haugen*, 543 U.S. 194, 198
4 (2004). Qualified immunity "gives ample room for mistaken judgments" and protects "all
5 but the plainly incompetent." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal
6 quotation omitted).

7 Defendants' motion does not argue that the constitutional deprivation was not
8 clearly established; it argues there was no deprivation at all. As discussed above, the
9 deliberate indifference standard is clearly established: "[p]rison officials violate the
10 Eighth Amendment if they are 'deliberately indifferent to a prisoner's serious medical
11 needs.'" *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (quoting *Estelle*, 429
12 U.S. at 104) (alterations in original omitted). Viewed in the light most favorable to Reed,
13 the evidence would support a jury's finding that Defendants were deliberately indifferent
14 to his serious medical needs. This is not a new or unique factual context, or a novel
15 constitutional claim.

16 Viewed in the light most favorable to Reed, the evidence would permit a jury to
17 find that the Defendants were deliberately indifferent to Reed's serious medical needs, in
18 violation of clearly established constitutional precedent. Defendants' Third Motion for
19 Summary Judgment on the issue of qualified immunity is DENIED.

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E. The Court will not decline supplemental jurisdiction over Reed’s state law claims.

This case was filed in 2016, and it has been vigorously litigated in this Court ever since. Reed is an elderly, sick, and incarcerated man. His medical negligence claim largely relies on the same evidence as his constitutional claim, it has been thoroughly litigated and briefed, and its viability is squarely before this Court.

It would not be fair to the Reed, to the Defendants, or to the state court that would face a brand-new lawsuit, burdened with the history reflected in this court’s lengthy docket, to decipher where this court left off and then start over from scratch on pleadings, discovery, motion practice, and the like. It would instead be a waste of time and judicial resources. Even if Reed’s § 1983 claims were not viable, the Court would not exercise its discretion to abandon this case at this late date. The Court therefore DECLINES to adopt the Recommendation that the Court exercise its 28 U.S.C. § 1367(c) discretion to decline supplemental jurisdiction over, and dismiss without prejudice, Reed’s state law medical malpractice claim. Instead, the Court will address Defendants’ motion on this claim.

F. Defendants’ summary judgment motion on Reed’s medical malpractice claim is denied.

Reed also asserts a state law medical malpractice claim against the Defendant doctors and argues that their summary judgment motion should be denied. While Defendants argue repeatedly in response to Reed’s Eighth Amendment claim that “mere negligence” does not amount to a constitutional violation, they also argue that Defendants’ medical negligence claim fails as a matter of law. Dkt. 160 at 19–23.

1 The Court has already rejected the argument that Reed's claim is procedurally
2 barred, Dkt. 147, and the evidentiary support for a jury's finding that the Defendant
3 doctors' medical care caused Reed harm is discussed above.

4 This leaves Defendants' argument that they are entitled qualified immunity from
5 Reed's negligence claim under state law. Defendants argue first that the Court already
6 determined that the HCV protocol was not unconstitutional, in part because it included an
7 exception for treatment where the patient exhibits extrahepatic symptoms that warrant
8 treatment. Accordingly, the Court agreed that Defendants were entitled to qualified
9 immunity for enacting that policy. *See* Dkt. 90 at 2. Defendants argue that that
10 determination necessarily implies that Defendants are entitled to qualified immunity on
11 Reed's claim that they violated his rights by prioritizing treatment for sicker patients, and
12 that that determination is the law of the case. Dkt. 189 at 4.

13 The negligence claim at issue is not based on the protocol's unconstitutionality; it
14 is based on the care Reed received. The claim that the Court's prior ruling necessarily
15 applies to Defendants' conduct in treating Reed in what they claim is a manner consistent
16 with that policy, is rejected, and the motion for summary judgment on that basis is
17 DENIED.

18 Defendants also argue that they are immune from Reed's negligence claim under
19 Washington common law, which applies when an officer "(1) carries out a statutory duty,
20 (2) according to procedures dictated to him by statute and superiors, and (3) acts
21 reasonably." *Gallegos v. Freeman*, 172 Wn. App. 616, 641–42 (quoting *McKinney v. City*
22 *of Tukwila*, 103 Wn. App. 391, 407 (2000)). Defendants' motion relies on their claim that

1 they followed the protocol and acted reasonably, as a matter law. As did their motion on
2 Reed's constitutional claim, Defendants' motion on Reed's negligence claims relies on
3 the testimony of their expert, Dr. Zawitz, that it was not possible to know "if and when"
4 Reed's disease progressed from F2 to F4. Dkt. 160 at 23 (citing Dkt. 156-1 at 28).

5 Reed responds that the state law immunity Defendants claim applies to police
6 officers and foster care case management workers, not to doctors employed by a state
7 prison. Dkt. 162 at 20–21 (citing *Babcock v. State*, 116 Wn.2d 596, 598 (1991) (creating
8 a "new" immunity for case management workers)). Reed argues, persuasively, that no
9 Washington Court has held that this immunity applies to medical providers. He also
10 argues, again persuasively, that even if that three-part test could lead to immunity under
11 Washington law, there are questions of fact about whether Defendants followed the
12 protocol and the "reasonableness" of their conduct in the complex factual circumstances
13 of this case is plainly a question of fact.

14 The Court agrees. Defendants have not cited authority supporting their contention
15 that Washington's qualified immunity for officers applies to medical providers in this
16 context. Absent such immunity, Defendants have effectively conceded that there is a
17 question of fact about whether their treatment met the applicable standard of care. In any
18 event, Reed has established that there is at least a question of fact on this issue.

19 Defendants' Motion for Summary Judgment on Reed's state law medical
20 malpractice claim is DENIED.
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III. ORDER

The Court having considered the R&R, Plaintiff's objections, and the remaining record, does hereby find and order as follows:

Magistrate Judge Christel's Report and Recommendation, Dkt. 180, is ADOPTED as to the Defendants' summary judgment motion on their claim that Plaintiff Reed failed to exhaust his administrative remedies, and their motion on that basis is DENIED. The Court also ADOPTS the recommended dismissal of Reed's claims against Defendant Robert Weber, and those claims are DISMISSED with prejudice.

The Court DECLINES to adopt the R&R's recommended resolution of Defendants' summary judgment motion on Reed's Eighth Amendment claim, as to both the conclusion that, viewed in the light most favorable to Reed, the evidence would not permit a jury to find that Defendants violated Reed's constitutional rights as a matter of law, and the resulting conclusion that the Court need not address whether the violation was clearly established, thus entitling Defendants to qualified immunity even if they violated Reed's constitutional rights. The Defendants have not demonstrated that, as a matter of law, they are entitled to qualified immunity, and their summary judgment motion on that basis is DENIED.

The Court also DECLINES the recommendation to decline supplemental jurisdiction over, and to dismiss without prejudice, Reed's state law medical malpractice claim. Defendants are not entitled to state law qualified immunity on that claim, and, viewed in the light most favorable to Reed, the evidence would support a jury verdict in his favor on this claim.

1 Defendants' Third Motion for Summary Judgment, Dkt. 160, is therefore
2 DENIED. The referral to Judge Christel is TERMINATED. Defendants have the right to
3 immediately appeal the denial of their motion on qualified immunity. If they appeal, the
4 Court will stay the case pending the outcome of that appeal.

5 If Defendants do not so appeal, the parties shall file a joint status report identifying
6 any other matters the parties and the Court should address before trial and propose a
7 schedule for doing so. The JSR should also address potential trial dates. It should be filed
8 within seven days of the expiration of the appeal period. The Clerk will then issue a
9 scheduling order based on the JSR.

10 Dated this 31st day of March, 2022.

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BENJAMIN H. SETTLE
United States District Judge